

LOREN HINNENKAMP
Claimant

THE BOEING COMPANY
Respondent

AETNA CASUALTY & SURETY
Insurance Carrier

WORKERS COMPENSATION FUND

[illegible]

ORDER

APPEARANCES

RECORD AND STIPULATIONS

ISSUES

What, if any, is the nature and extent of claimant's injury? Work disability is not at issue in this matter as the parties have stipulated none is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After having reviewed the entire evidentiary record, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant suffered accidental injury arising out of and in the course of his employment on August 5, 1993, when he fell while hanging duct work. A metal elbow, temporarily suspended in the air, broke loose, striking claimant and knocking him from his stand. Claimant fell approximately seven feet to the ground, landing head first on the concrete. Claimant suffered injury to his right shoulder, he suffered two broken wrists, fractured his skull, broke his nose, broke his jaw, and knocked his four bottom front teeth out. Claimant underwent surgery in order to repair the multiple fractures to his head, face, and arms.

Claimant was examined by Dr. Ernest R. Schlachter at the request of his attorney and by Dr. Richard J. Cummings as a result of an independent medical examination ordered by Shannon Krysl, the Administrative Law Judge originally assigned to this case. Dr. Schlachter diagnosed post concussion syndrome; chronic sinusitis; migraine headaches, post-traumatic; partial ankylosis of the right wrist with limited use of the right thumb; and, a rotator cuff tear of the right shoulder. He assessed claimant a 20 percent impairment to the body as a whole as a result of the first three diagnoses; a 20 percent upper extremity impairment for the right shoulder of which 75 percent is attributable to this injury and 25 percent to claimant's February 2, 1993, injury addressed in Docket No. 179,378; and a 30 percent impairment to the upper extremity as a result of the right wrist ankylosis.

Dr. Cummings, a specialist in otology examined claimant in order to ascertain what, if any, sinus, head, or ear abnormalities he suffered as a result of the fall. Dr. Cummings diagnosed a loss of hearing in both ears and assessed a 6 percent impairment to the right ear and a 4 percent impairment to the left ear which combines for a 4 percent bilateral hearing impairment. He was unable to ascertain how much of the loss was from the accident and how much preexisted. He did request audiograms from respondent in order to make a pre- and post-injury comparison but these audiograms were never provided and a comparison never made. Dr. Cummings opined that claimant's headaches could not be related to any sinus disease as his x-rays were normal. He did diagnose rhinitis and nasal obstruction but assessed no functional impairment as a result of these nose and sinus conditions. He did opine that many of the symptoms of sinusitis and headaches could be related to claimant's smoking and recommended claimant stop smoking. It is significant that Dr. Schlachter was unaware that claimant smoked.

Administrative Law Judge Jon L. Frobish, in looking at the report of Dr. Cummings, rejected Dr. Cummings' report finding that the court was unable to ascertain whether "proper protocol was followed by Dr. Cummings." As the report of Dr. Cummings was submitted as part of an independent medical examination and his deposition testimony was not taken, it is impossible for the Appeals Board to decipher the Administrative Law Judge's

meaning regarding whether proper protocol was followed. Under K.S.A. 44-510e, if the employer and employee are unable to agree upon an employee's functional impairment, the claimant may be referred to an independent health care provider selected by the administrative law judge. The health care provider so selected shall issue an opinion regarding the claimant's functional impairment which "shall" be considered by the administrative law judge in making a final determination.

When an independent medical examination, under K.S.A. 44-510e, is ordered, the administrative law judge must consider the opinion of the independent appointed physician. The Appeals Board acknowledges the amount of weight given that medical report is clearly within the discretion of the Administrative Law Judge but it is not appropriate for the report to be rejected in toto absent some specific finding that the report is in some way tainted. Here, a finding that the doctor did not follow appropriate protocol is not supported by the record.

In considering the reports and opinions of both Dr. Schlachter and Dr. Cummings, the Appeals Board acknowledges certain deficiencies do exist. Claimant had hearing problems prior to the fall but it is impossible to ascertain the extent of these problems. It is acknowledged that 25 percent of Dr. Schlachter's right-shoulder impairment rating is attributable to claimant's February 2, 1993, accident. In addition, Dr. Cummings does not relate claimant's headaches to any sinus disease and he assessed no impairment to claimant's nose and sinus condition as many of claimant's symptoms may have been related to claimant's smoking.

It is the function of the trier of facts to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991). The Appeals Board, in considering the reports of Dr. Cummings and Dr. Schlachter, awards claimant a 30 percent permanent partial disability to the body as a whole as a result of the fall suffered August 5, 1993.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated July 31, 1997, should be, and is hereby, affirmed and claimant is granted an award for a 30% permanent partial disability to the body as a whole, based upon an average weekly wage that would meet the maximum rate by law for compensation, for the injury sustained on August 5, 1993.

Claimant is entitled to 54.71 weeks temporary total disability compensation at the rate of \$313 per week totaling \$17,124.23, followed thereafter by 112.59 weeks permanent partial disability compensation at the rate of \$313 per week totaling \$35,240.67 for a 30% permanent partial disability to the body as a whole making a total award of \$52,364.90.

As of December 19, 1997, there would be due and owing to claimant the entire award of \$52,364.90 which is ordered paid in one lump sum minus amounts previously paid.

Claimant is entitled to unauthorized medical up to the statutory maximum upon presentation of an itemized statement verifying same.

Future medical will be awarded upon proper application to and approval by the Director.

Claimant's attorney fee contract is approved insofar as it is not in contravention to K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Kansas Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Barber & Associates	
Transcript of regular hearing	\$125.10
Bannon & Associates	
Deposition of Ernest R. Schlachter, M.D.	\$145.90

IT IS SO ORDERED.

Dated this ____ day of April 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris A. Clements, Wichita, KS
Frederick L. Haag, Wichita, KS
Kurt W. Ratzlaff, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director